

*United States Court of Appeals
for the Second Circuit*



APPENDIX

B
PLS

75-7149

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

EVELYN DUTIL,
Administratrix of the Estate of
RAYMOND DUTIL,
Plaintiff-Appellant,

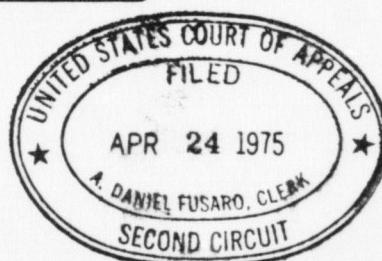
v.

MARLIN M. MAYETTE,
Defendant-Appellee

JOINT APPENDIX
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

ROBERT D. RACHLIN,
Attorney for Plaintiff-Appellant
9 Prospect Street,
St. Johnsbury, Vermont 05819

JOHN M. DINSE
Attorney for Defendant-Appellee
186 College Street,
Burlington, Vermont 05401



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Civ. 73-138 Dutil v. Mayette

DATE	PROCEEDINGS	DATE Order Judgment
1973		
May 18	Filed Complaint.	1.
" "	Issued Summons.	
June 19	Filed Summons returned served.	2.
" 30	" Notice of Appearance of Dinse, Allen & Erdmann, Esqs., for Deft. and Deft's Answer.	3.
Dec. 3	At the Call of the Calendar before Judge Holden, it was ORDERED: That this case be consolidated with Civ. 73-117.	
1974		
Jan. 7	Filed Downs, Rachlin & Martin's Motion to Withdraw as Counsel for Plaintiff.	4.
Mar. 19	" Stipulation for Continuance to next term of Court.	5.
Apr. 1	Upon consideration of Stipulation for continuance to next term of Court, it is	
" "	ORDERED: Approved. Attorneys notified.	
" "	At the Call of the Calendar before Judge Holden, it was	
" "	ORDERED: Case continued.	
May 31	Filed Withdrawal of Motion to Withdraw appearance of Downs, Rachlin and Martin, Esqs.	6.
June 13	" Deft's Memorandum of Law.	7.
July 10	Filed Plaintiff's memorandum of law.	8.
1975		
Jan. 3	In Court before Judge Holden. Robert Rachlin, Esq. for Plaintiff; John Dinse, Esq. for Defendant. Hearing on Defendant's Affirmative Defenses in Answer. Statements made to Court by Mr. Dinse in support of Defendant's affirmative defenses in answer and moves that case be dismissed on grounds of statute of limitations; followed by Mr. Rachlin in opposition to defendant's motion; Further statements made to Court by Mr. Dinse and by Mr. Rachlin.	
" "	Mr. Rachlin consents that if defendant desires to file motions they can be construed as being heard at this hearing.	
" "	ORDERED: Defendant may file motions and they may be considered filed nunc pro tunc. Defendant may have ten days to file same.	
" "	Decision reserved.	
" 13	Filed Deft.'s Motion to Dismiss.	9.
Feb. 5	Filed Memorandum and Order -- That the defendant's motion to dismiss is granted. Mailed copy to attorneys.	10.
" 26	" Pltf's Notice of Appeal. Mailed copy to Judge Holden, Downs, Rachlin & Martin, Esqs., Dinse, Allen & Erdmann, Esqs., Court Reporter and Clerk, U. S. Court of Appeals for the Second Circuit, N.Y., N.Y.	11.
Mar. 24	" Transcript of Hearing held 1-3-75.	12.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

02

EVELYN DUTIL, Administratrix of the Estate of Raymond Dutil Clinton, Massachusetts Plaintiff

v.

MARLIN M. MAYETTE Sutton, Vermont Defendant

C.A. No. _____

COMPLAINT

1. Plaintiff is a citizen of the Commonwealth of Massachusetts. Defendant is a citizen of the State of Vermont.

2. The amount in controversy exceeds Ten Thousand Dollars (\$10,000).

3. On November 14, 1972, the Probate Court within and for the County of Worcester, Massachusetts appointed plaintiff Administratrix of the Estate of Raymond Dutil, a capacity in which she serves at present.

4. On May 15, 1971, decedent Raymond Dutil was a passenger in a vehicle operated by Henry R. LaLiberte south on U.S. Route 5 in St. Johnsbury, Vermont.

5. At various times said LaLiberte attempted to pass and overtake a truck being operated in the same direction by defendant.

6. Defendant repeatedly acted to prevent LaLiberte from overtaking said truck.

7. On the final occasion that LaLiberte attempted to overtake defendant's truck defendant negligently failed

to give way to LaLiberte and willfully operated his truck in a manner calculated to prevent Laliberte from overtaking him.

S. In consequence of defendant's negligence and willfulness aforesaid the vehicle operated by LaLiberte, while attempting to pass defendant's truck, came into head-on collision with a vehicle proceeding in the opposite direction.

9. In consequence of said collision decedent suffered severe injuries leading proximately to his death; decedent endured great pain and suffering; decedent's injuries occasioned great medical, nursing, hospital, and related expenses; and decedent's next-of-kin have suffered great pecuniary loss.

WHEREFORE plaintiff demands judgment against defendant in the sum of Two Hundred Fifty Thousand Dollars (\$250,000).

Plaintiff elects trial by jury.

St. Johnsbury, Vermont. May 16, 1973.

DOWNS, RACHLIN & MARTIN

By Robert D. Rachlin
Robert D. Rachlin
A member of the firm.

DISTRICT OF VERMONT

EVELYN DUTIL, Administratrix of)
the Estate of Raymond Dutil)
v.) CIVIL ACTION
MARLIN M. MAYETTE) FILE NO. 73-136

04

NOTICE OF APPEARANCE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF VERMONT:

I hereby enter the appearance of Dinse, Allen & Erdmann for the defendant,
MARLIN M. MAYETTE, in the above captioned case.

Dated at Burlington, Vermont this 29th day of June, 1973.

DINSE, ALLEN & ERDMANN

S. JOHN M. DINSE
BY _____

A member of the firm
136 College Street
Burlington, Vermont 05401

DEFENDANT'S ANSWER

NOW COMES the defendant, MARLIN M. MAYETTE, by his attorneys,
Dinse, Allen & Erdmann, and in answer to the plaintiff's complaint says:

1. The defendant admits he is a citizen and resident of the State of Vermont
but is without information sufficient to form a belief concerning the remaining
allegations of paragraph one and therefore denies said allegations.
2. The defendant denies the allegations of paragraph two of the plaintiff's
complaint.
3. The defendant is without information sufficient to form a belief concerning
the allegations of paragraph three of the plaintiff's complaint, and therefore denies
said allegations.

4. The defendant is without information sufficient to form a belief concerning the allegations of paragraph four of the plaintiff's complaint, and therefore denies said allegations.

5. The defendant is without information sufficient to form a belief concerning the allegations of paragraph five of the plaintiff's complaint, and therefore denies said allegations.

6. The defendant denies the allegations of paragraph six of the plaintiff's complaint.

7. The defendant denies the allegations of paragraph seven of the plaintiff's complaint.

8. The defendant denies the allegations of paragraph eight of the plaintiff's complaint.

9. The defendant is without information sufficient to form a belief concerning the allegations of paragraph nine of the plaintiff's complaint, and therefore denies said allegations.

AFFIRMATIVE DEFENSES

1. The plaintiff's claim or a part of it is barred by the statute of limitations.
2. The plaintiff lacks capacity to prosecute this action.

Dated at Burlington, Vermont this 29th day of June, 1973.

MARLIN M. MAYETTE

BY DUNSE, ALLEN & ERDMAN

BY S. JOHN M. DUNSE

Copy mailed to:

Downs, Rachlin & Martin
Plaintiff's Attorneys

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 DISTRICT OF VERMONT

4 -----)
5 Evelyn DUTIL, Administratrix of)
6 the Estate of RAYMOND DUTIL)
7))
8 v.) Civil Action No. 73-138
9))
10 MARLIN M. MAYETTE)
11 -----)

12
13
14
15 Hearing before The HONORABLE JAMES S. HOLDEN, Chief,
16 U.S. District Judge, For The District of Vermont, at
17 Rutland, Vermont, 3 January 1975, on DEFENDANT'S
18 AFFIRMATIVE DEFENSES IN ANSWER.

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Appearances:

17 ROBERT RACHLIN, Esquire
18 Attorney for Plaintiff

19 JOHN M. DINSE, Esquire
20 Attorney for Defendant.

1 continues to insist that he must meet all these State time
2 limits, result in the termination of the controversy against
3 him.

4 Then the Court goes on to say that
5 you can't in effect, revoke the Federal rules to produce this
6 kind of a result and quite clearly, under Rule 3, it designates
7 that the filing of the Complaint is the commencement of the
8 action and clearly, this took place after the statute run.

9 Lastly, the plaintiff seems to suggest
10 that perhaps somehow or other, under 12 V.S.A. 552, maybe some-
11 time during this period of time the Defendant was out of the
12 State somewhere.

13 Well, it seems to me that if that is
14 at all a sensible approach to it, the burden is not ours, but
15 the plaintiff's to determine this so we say this is reaching
16 rather far afield to protect against the statute of limita-
17 tions which has obviously run.

18 THE COURT: Mr. Rachlin?

19 MR. RACHLIN: Your Honor, if the
20 Court Please, as we stated in our Memorandum and as I will
21 state again, it is unclear to me precisely what the procedural
22 framework at the moment is. No motions to dismiss have been
23 filed, no motions for summary judgment have been filed and
24 indeed, no motions whatever have been filed.

25 We are - we have filed a Memoranda
26 and have appeared for a hearing because we received at one
27 point a notice from the Clerk that the affirmative defenses

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1 filed by Mr. DINSE have set the wheels of Local Rule 9 in
2 motion. But, as things stand for the moment, I believe
3 there are no motions before the Court, which is the point that
4 I attempted to make somewhat earlier without success. However,
5 on the assumption that the issues, for whatever procedural
6 disposition the Court wishes to make, are before this Court,
7 I will address myself to each of the two points that have
8 been advanced by Mr. DINSE in his affirmative defenses, taking
9 first of all, the point that he just began with, namely the
10 question about the capacity to sue.

11 As Your Honor is aware, under F.R.C.
12 P. 17, the capacity of parties to sue is governed by State law.
13 So the question is whether or not in an action founded upon
14 the Vermont Wrongful Death Statute, a non-resident Administra-
15 trix may commence a suit in this Court.

16 I am aware of the WEINSTEIN decision
17 which I will suggest presently and most respectfully, noting
18 the Judge that rendered that Decision, is in error. I will al-
19 so state that I was not aware of the WEINSTEIN Decision which
20 was decided in November of 1972, at the time that we insti-
21 tuted the action. The action was instituted on the strength
22 of the Vermont case BROWN versus PERRY, which I am aware that
23 this Court considered and took into account in rendering the
24 WEINSTEIN Decision but which I respectfully suggest this Court
25 mis-read.

26 In BROWN versus PERRY, an administra-
27 tor, who had qualified both in Vermont and in New Hampshire,

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1 instituted a Wrongful Death action. The Vermont Supreme Court
2 noted that although letters of administration have no extra-
3 territorial force, a foreign administrator, does not have,
4 by virtue of probate authority, but by virtue of authority
5 vested by statute that he comes into court as a trustee and
6 therefore, that a foreign administrator could sue in the
7 Vermont Courts, in a wrongful death action. This is not to
8 say, nor do the Vermont Supreme Court suggest, that a foreign
9 administrator was qualified to sue in a Vermont Court, in all
10 cases.

11 The BROWN versus PERRY was confined
12 to the wrongful death situation.

13 Now, Your Honor's Opinion in WEINSTEIN,
14 you have stated you have referred to BROWN versus PERRY but
15 you have stated in your Opinion that in point of fact, - I, -
16 I'm referring now to page 299 of 358 Fed. Sup., it has been
17 suggested by way of dicta that a foreign administrator may
18 maintain an action in Vermont under a wrongful death statute
19 for a right and remedy created by the laws of New Hampshire
20 for a death that occurred in that jurisdiction.

21 In that instance, however, ancillary
22 letters of administration had been issued by the Probate Court
23 in Vermont whereby, if I read Your Honor's Opinion correctly,
24 it was Your Honor's view that that created a distinction which
25 in effect rendered the statement, that, - that rendered the
26 holding in BROWN versus PERRY, non-applicable to the WEINSTEIN
27 situation.

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However, in BROWN versus PERRY, the
Vermont Supreme Court at 107 Vermont, correction, that should
be 104, Vermont, and I have noticed one or two "typos" in my
Memorandum, on page 3 the cite should be 104 Vermont. On
page 71, the Vermont Supreme Court specifically stated that
the action is maintainable by him in either capacity. That
is, either as a Vermont appointed administrator or a New
Hampshire appointed administrator.

Now, since the Court in applying in
in, in passing upon the question of capacity under F.R.C.P. 17,
as I understand that rule, bound to apply Vermont law, I re-
spectfully submit to Your Honor, that the Decision in the
WEINSTEIN case, mis-read or mis-apprehended the Decision of
the Vermont Supreme Court in BROWN versus PERRY.

On the other hand, I recognize that
- that is, at the moment, the law of this District. I would
therefore like to suggest that, if, upon a re-consideration
of the issue, the Court determines that the WEINSTEIN Decision
was correct, and that in any event, Mrs. DUTIL, as a non-
resident administratrix, does not have the capacity to sue, or
to institute this action, I would ask the Court not to dismiss
the action, since no motion to dismiss has been filed, but to
grant the plaintiff a period of time within which to qualify
in Vermont.

Now, if it is suggested that the
statute has now expired, I would point out to the Court that
it has been held that qualifying an administrator who brought

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1 an action before he was qualified to bring it, relates back
2 to the original time of institution of the action and that if
3 the statute of limitations did not expire by the time I brought
4 the action, a question to which I will address myself momen-
5 tarily, then, permitting the plaintiff to qualify in Vermont
6 would not involve an act, - would not involve a recommencement
7 of the action but would relate back to the original institution
8 and I would quite, excuse me, I would cite GHILAIN versus
9 COUTURE 84 New Hampshire 48, 146 Atlantic 395 and also in
10 65, ALR, 553, - it was over-ruled on other grounds in PIKE
11 versus ADAMS, 99 New Hampshire, 221, 108 Atlantic Second, 55.

12 I am also bound to bring to the
13 Court's attention, but I am aware of a jurisdiction which has
14 held to the contrary the position I am asserting, and I would
15 therefore cite to the Court in opposition to my position, HALL
16 versus SOUTHERN RAILWAY COMPANY, 149 North Carolina, 108, 62
17 Southeast, 899 and this, this authority is strictly on the
18 question of whether or not qualifying an administrator after
19 the statute has expired, but once the action has been brought
20 within the statute, relates back to the time of the institution
21 of the action or as a new action.

22 Now, on the statute of limitations
23 question, Your Honor, it's been said of those who fly retract-
24 able gear aircraft, that they are divided into two categories,
25 those who have landed gear up and those who are going to. And
26 I trust that lawyers are likewise divided into two categories,
27 those who have tripped over a statute of limitations and those

1 who are going to. I readily confess that my bringing this
2 action two years and one day after the death of the decedent
3 was not a deliberate effort to litigate the points that I have
4 made in my Memorandum. However, I believe that through no
5 virtue of my own, and far in excess of my just desserts, I think
6 that I am just barely under the wire, at least as far as a
7 dismissal at this stage goes.

8 I would point out again, that there
9 has been no motion to dismiss. Secondly, a motion to dismiss
10 at this stage would be, in my view, inappropriate generally
11 speaking in order to dismiss a case on the basis of the stat-
12 ute of limitations, evidence is necessary.

13 This is particularly true where Ver-
14 mont has a savings statute which says that if the defendant
15 has been a non-resident in the State and hasn't had any at-
16 attachable assets in the State during the period of limitations
17 has been running, then the statute is tolled for that period.

18 Now, I will be candid with the Court,
19 so far, I have been unable to develop any facts that would
20 support that particular way out of the dilemma. However, I
21 would also say that we are by no means through with our inves-
22 tigation on that point.

23 Now the next point that I would raise
24 is that we do have a general statute in Vermont that states
25 that when time is to be reckoned from a day, date upon act
26 done, such day, date or date when such act is done, shall not
27 be included in the computation unless otherwise provided.

1 I therefore argue that since the
2 decedant died May 15, 1971, May 16 was the last day upon which
3 the action could be commenced.

4 This leaves me in the position of
5 having to ask the Court to construe the word "commence." I
6 am aware of F.R.C.P. 3, which provides that a civil action is
7 commenced by filing the complaint with the Court. However, in
8 this particular case, we are dealing with a statute of limita-
9 tions based upon an action which is 100% statutory, although
10 there is some recent Massachusetts authority to the effect
11 that there was a common law death action. It's been the pre-
12 vailing view that wrongful death actions were entirely the
13 creature of statute.

14 Since the action is not a common
15 law but is strictly a statutory action, then it seems to me
16 that it is appropriate to apply Vermont law as to the meaning
17 of the commencement of the action, rather than the Federal
18 rule. And I have cited the most recent Vermont Decision on
19 this point, JACQUE versus JACQUE, 128 Vermont, 140, in which
20 it held that the commencement of the action was the date of
21 the complaint.

22 THE COURT: I take it that you'd
23 like that Opinion all right.

24 MR. RACHLIN: A rare example of
25 judicial wisdom, Your Honor. Not a rare example, excuse me,
26 My final point is that the law of course does not favor forfit-
27 ures and if the Court feels that at this stage that it can

rule upon a motion to dismiss which hasn't been filed, but
which presumably the Court could, at any time consider, as
having been filed in the interests of judicial economy.

I would point out to the Court that
whatever ambiguities may exist as to the meaning of the word
"commencement," ought to be resolved in such a way that a for-
fixture will not occur.

The other, - my arguments have been
presented in Memorandum form, - one other point that I would
like to make before concluding, my Brother has suggested that
affidavits should have been filed on as to one or more issues.
Again, the affidavit would be appropriate, had there been a
Motion for Summary Judgment. There has been no motion for
summary judgment. I don't believe that where there has been
no motion for anything, I am not entirely sure that an affi-
davit would serve any useful purpose and on the administration
point, if the Court feels that it is bound, if the Court feels
that I am bound by WEINSTEIN, that it is bound by WEINSTEIN,
I would ask only that I be given a reasonable period of time
to qualify my client, who now resides in IDAHO, as Adminis-
tratrix, with ancillary powers in Vermont, on the theory of
the New Hampshire case that I cited indicating that the qualif-
ication would relate back to the time of the institution of
the suit and would not constitute a recommencement of the
action.

THE COURT: Anything further, Mr.
DINSE?

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MR. DINSE: Just very briefly.

2 Historically I don't recall how we got here either. That is
3 how we --

THE COURT: I think you got here by
way of the Clerk's Office.

6 MR. DINSE: I suspect we did. And
7 if it, if someone feels aggrieved by virtue of the fact that
8 we don't have a motion to dismiss or a motion for summary
9 judgment, I am sure we can remedy that forthwith. The issue
10 I think would be the same when we did it, however.

11 The principle item that Mr. RACHLIN
12 seemed to discuss a few minutes ago again, had to do with
13 somehow instead of using the Federal rules which I suppose
14 we're bound by in this Court, we should revert to the State
15 Court rules which would do better by him, I am sure, than the
16 Federal Court rules.

17 Again, in the HANNAH case, the Court
18 explicitly says, the Erie Rule has never been invoked, to
19 avoid the Federal Rule, which is exactly what he is trying to
20 do here. I don't think, there's a bit of ambiguity in Rule
21 Number Three. It says that the suit is commenced when the
22 complaint is filed in the Clerk's Office, which in this case,
23 happened to be three days after the man died. We don't see
24 any ambiguity whatsoever in that and although I think that
25 there is great credit due to Mr. RACHLIN's ingenuity, I'm
26 afraid that is simply isn't what the law is.

27 MR. RACHLIN: Your Honor, there is one

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1 additional point that I neglected to make which relates dir-
2 ectly to the point just made by my Brother. If we apply the
3 Federal Rule and I think that there is some reason where we
4 are dealing with a purely statutory cause of action, which is
5 founded in a Vermont Statute not to, but if you apply the
6 Federal Rule, I maintain that we still come within that, or we
7 may come within it. There is a Federal Decision in 1959 which
8 I have cited in my memorandum, JOHANSSON versus TOWSON, where
9 it was held that the filing was completed when the paper was
10 placed in the Deputy Clerk's Post Office box.

11 Now, there is no way obviously, of
12 knowing the precise date that this document was placed in the
13 Deputy Clerk's, or the Clerk's Post Office Box. However, it
14 is possible that it could be established that if the documents
15 were placed in the mail on the date that it bore, which I
16 think is a fair presumption, that the process of transporting
17 the mail from St. JOHNSBURY to BURLINGTON was such that indeed
18 it may have arrived at the Clerk's Office on the 16th, or, -
19 on the 16th. Again, without the taking of some evidence on
20 this point, it is very, very difficult to, I think, for the
21 Court to rule on it.

22 But, that is a Federal Decision and
23 until it - it seems to me that before the Court exacts a for-
24 fiture here, that perhaps some of these presumptions either
25 ought to be indulged or the defendant-plaintiff, be given ~~sue~~
26 an opportunity to, within such procedural framework as the
27 Court sees fit, to present evidence and litigate the factual

1 aspects that have to be considered, in my view, before the
2 unspoken motion to dismiss is granted.

3 THE COURT: Well, I think if the
4 Court defers ruling on the points that have been raised at the
5 suggestion of the Clerk, by setting it under Rule 9, I think
6 it is only going to have to meet them some time, sooner or
7 later, and I think there are several Vermont statutes involved
8 here, that, one that you had overlooked in your oral argument
9 and that is on the question of capacity and that's the one that
10 is referred to in the foot note in WEINSTEIN, the statute
11 which was passed subsequent to BROWN against PERRY, which
12 throws the whole burden of distribution and so forth, into the
13 probate courts. You've got to go there some day anyway, or
14 at least that is my understanding of the statute.

15 MR. RACHLIN: I am aware of that
16 statute, Your Honor, but I don't see why, if a, if under
17 BROWN versus PERRY a foreign administrator is competent to
18 initiate a wrongful death action in the Vermont courts, why he
19 should not then, likewise, be fully authorized to apply to the
20 probate court or to whatever court is necessary, in order to
21 effect the distribution. I am aware of the '61 statute, but
22 my question is the same whether you are talking about county
23 or probate court.

24 THE COURT: I think that's probably
25 true, but you've got to get into the Vermont court judicial
26 system sooner or later any way. I think the Court may well
27 have authority to permit to, you to, or party plaintiff in your

1 posture cure the incapacity by getting proper authorization.
2 But I still there there is some lion in the path by way of
3 by way of statute of limitations, by - in particular the ap-
4 plication of what statutory period of limitation applies in
5 wrongful death actions, whether the dismissal of this action
6 for want of capacity, if that should be the result, is effected
7 by the recently enacted statute amendment to 12 VSA 558 which
8 took the decision, requires a decision whether a wrongful
9 death action is a civil action within the meaning of the
10 general statute of limitations which allows six years and
11 all these problems that you are going to have to face and I
12 will have to pass upon, plus the application that if it should
13 get to that point, of the Vermont Rules of Civil Procedure
14 which were enacted subsequent to, well, the point that, which
15 were enacted fairly recently and haven't been construed in
16 this context and it could well be that the doctrine of exten-
17 sion should apply and I, after I made the decision on some
18 of these points, the Vermont Supreme Court said you are all
19 wrong and on pending on an appeal, and your day in court and
20 everybody else's day in court will be lost, I think by defer-
21 ring action on it by permitting you to go to Caledonia Court
22 and then having this Court pass on these essentially Vermont
23 statutory procedure cases, makes it an ideal situation to apply
24 the doctrine. I think you have to face them somewhere, but
25 I think it's probably better to apply them up in Montpelier.

26 MR. RACHLIN: I would say where one
27 has to face lions in one's path, all things being equal, it is

1 better to do it on Friday than on Wednesday.

2 THE COURT: What do you say about
3 that? Is there any reason why the Court shouldn't treat the
4 defendant's affirmative defense in the Memorandum which has
5 been filed as motions to dismiss?

6 MR. RACHLIN: It is tempting to say
7 there is no reason but - and I would certainly have no objec-
8 tion to one being filed on a tunc, pro-tunc basis. The prob-
9 lem is, I find that when we begin to short-circuit the proced-
10 ures, which - of which procedures have a long body of jurisprudenc
11 attached to them, that we get into fairly muddy waters. I
12 think it would be preferable, with all respect, if counsel
13 were invited to file the motion that he has in mind with the
14 understanding that they could be treated as though they were
in connection
15 filed/with this hearing, unless there is some reason we should
16 see why they shouldn't, rather than simply treating them as
17 having been filed when they haven't. I leave that entirely
18 up to you.

19 THE COURT: Well, I did want to save
20 you another trip down here. I think you have raised at this
21 hearing, a request to have the matter continued to give you
22 the opportunity to have the ancillary letters issued.

23 MR. RACHLIN: Well, may I suggest,
24 Your Honor, that perhaps those motions could be filed. It
25 might not be necessary to have them at another hearing, or to
26 have another hearing if, indeed, we do have under Local Rule
27 Number 9, the option presumably to, of simply certain memoranda

1 as we wish and as the Court would wish and we might ask for
2 another hearing but all in the same, all I am saying is that
3 I would rather, from the standpoint of keeping the record unam-
4 biguous, have the motions filed, treated as though filed in
5 connection with the agreement we just had.

6 MR. DINSE: Well at least under,
7 whatever the rule is, that deals with lack of capacity I am
8 sure that Mr. RACHLIN can tell me what that is, I think the
9 Court can treat this as a Motion, or as though it were a
10 Motion. I'm not sure whether that is true of the statute of
11 limitations.

12 MR. RACHLIN: I agree on Rule 17,
13 but I am not so sure about the statute of limitations point.
14 Perhaps someone who is more familiar with those, with the rules
15 on that particular point could enlighten me but I agree on
16 Rule 17, that is true.

17 THE COURT: Well, why don't we allow
18 you, Mr. DINSE, to file a motion to dismiss on whatever grounds
19 that have been covered in this hearing, we'll consider it
20 Nunc protunc and take it from there. I will say that if any-
21 body wishes to brief the point of extension I will be glad to
22 consider it but it is my own thought at the moment, that even
23 if you get over the first hurdle that this is a proper case,
24 it might be an exercise in futility, particularly if the
25 Vermont Supreme Court construes some of its own rules and
26 some of its own statutes, contrary to the method or contrary
27 to the final results, which I might obtain, and we're still in

1 the doll works.

2 Very well, how much time do you -
3 will you file the motion within a few days?

4 MR. DINSE: Yes, Your Honor.

5 THE COURT: Does anybody want to brief
6 any further point?

7 MR. RACHLIN: No, I think not, Your
8 Honor.

9 THE COURT: Verywell.

10 MR. RACHLIN: Thank you.

11 THE COURT: Well as soon as, - we will
12 give you ten days to file all or any motions that you may care
13 to, addressed to the questions that have been raised in the
14 course of this hearing and the Court will take it from there.

15 MR. RACHLIN: Thank you, Your Honor..

16 (This hearing ended at 3:30 p.m.)

17 CERTIFICATE

18 I, Herman J. Vesper, Official Court Reporter, U.S. District
19 Court, For The District of Vermont, hereby certify that the
20 foregoing 18 pages are a true and complete transcript of my
21 verbatim stenographic notes of the hearing in the case of
22 EVELYN DUTIL, Administratrix of the Estate of RAYMOND DUTIL,
23 Civil Action #73-138, which was heard before The Honorable
24 JAMES S. HOLDEN, Chief U.S. District Judge For The District
25 of Vermont, at Rutland, Vermont, 3 January 1975.

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FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
24

Evelyn Dutil, Administratrix
of the Estate of
Raymond Dutil

v.

Marlin M. Mayette

Civil Action

File No. 73-138

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[Handwritten signatures]

MEMORANDUM AND ORDER

The defendant has moved to dismiss this wrongful death action (14 V.S.A. §§ 1491, 1492) on two grounds: (1) the action is barred by the applicable statute of limitations and (2) the plaintiff, by failing to procure ancillary letters of administration in Vermont, lacks capacity to bring this suit. The Court's finding that the plaintiff does lack capacity to bring this suit makes it unnecessary to reach the statute of limitations issue.

At the hearing on January 3, 1975 on these two affirmative defenses, plaintiff's counsel conceded that the plaintiff administratrix had not procured ancillary letters of administration in Vermont. Without the authorization of ancillary letters of administration issued in Vermont, a plaintiff administratrix appointed in a foreign jurisdiction, lacks capacity to maintain a wrongful death action in this state. Accordingly, the complaint must be dismissed. Weinstein v. Medical Center Hospital of Vermont, 358 F.Supp. 297 (1973).

By dismissing this complaint for lack of capacity, the Court leaves the novel and unsettled questions of recent Vermont statutory changes attending the limitations of actions to the state courts.
^{1/}

It is ORDERED:

That the defendant's motion to dismiss is granted.

Dated at Rutland, in the District of Vermont, this
4th day of February, 1975.

/s/ James S. Holden

James S. Holden
Chief Judge

Footnotes

- 1/ The difficult and novel questions of state law include whether this action is deemed "commenced" for purposes of tolling the statute of limitations as of the date of the complaint (see Jaques v. Jaques, 128 Vt. 140, 141 (1969); Bethel Mills, Inc. v. Whitcomb, 116 Vt. 357, 361 (1950)) or whether the new Vermont Rules of Civil Procedure, Rule 3, and 12 V.S.A. § 466 require that an action be "commenced" by filing or service. There may be a further question involved in whether actions for wrongful death under 14 V.S.A. § 1492 are subject to the provisions of Chapter 23, Vermont Statutes Annotated.



